INDEX.

CITATIONS.

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1081.

PHILIP B. FLEMING, Temporary Controls Administrator,
Petitioner,

v.

ADOLPH HIRSCH.

On Petition for Writ of Certiorari to the United States Emergency Court of Appeals.

RESPONDENT'S BRIEF IN OPPOSITION.

The Acting Solicitor General, on behalf of Petitioner, has filed a petition for writ of certiorari to review the judgment (R. 328-9) of the United States Emergency Court of Appeals filed in the above entitled case on January 2, 1947.

OPINIONS BELOW.

The original opinion of the United States Emergency Court of Appeals and its opinion on denial of petition for rehearing are not yet reported but appear in the record on pages 310-320 and 340-341.

JURISDICTION.

The jurisdiction of this Court is invoked under section 204(d) of the Emergency Price Control Act of 1942[1] (50 U. S. C. App., Supp. V, section 924(d)), which makes applicable section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED.

Having brought in a United States District Court a treble damage action under section 205(e) of the Act for violation of a maximum price, namely, the March 1942 price charged by the most closely competitive seller, but subsequently being "apparently fearful"[2] of his ability to establish a basis for determining a price by this method, may the Administrator[1] under the Act and consistent with his own regulations issue (over two and one half years after the sales and over two years after instituting the treble damage action) an order establishing a dollars and cents price applicable solely to the defendants in that action and solely to the sales that are the subject matter of that action for the expressed purpose of substituting such price as the basis for the imposition of treble damages in that action?

May the Administrator thus substitute his penalty for the criminal penalty prescribed by the Act where a sale is made for which no applicable ceiling price exists and the seller fails to apply to the Administrator to fix such price?

If such authority is conferred on the Administrator by

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[1] Hereinafter the following abbreviated designations are used:
"Act" for Emergency Price Control Act (50 U. S. C. App., Supp. V, §§ 901-946);
"GMPR" for the General Maximum Price Regulation;
"MPR" for Maximum Price Regulation;
"OPA" for Office of Price Administration;
"Administrator" for Price Administrator, Office of Price Administration.

[2] The quoted words are those used by the court below (R. 313).

the Act, is the Act pro tanto invalid as being so arbitrary as to be contrary to the due process clause of the Fifth Amendment to the Constitution, or as constituting an ex post facto law contrary to Article I, section 9, clause 3, of the Constitution, or as being an interference with or usurpation of the judicial powers of the courts contrary to Article III of the Constitution.

STATUTE AND REGULATIONS INVOLVED.

Pertinent provisions of the Act and regulations are set forth in the Appendix to this brief.

STATEMENT.

Petitioner's statement omits or fails to give proper emphasis to certain facts believed by Respondent to be essential to the adequate consideration of the petition and fails adequately to set forth Respondent's position. The following restatement is therefore made:

The Administrator, on May 27, 1943, filed a complaint in the United States District Court for the Western District of Kentucky against about 50 of the 400 stockholders of the Cummins Distilleries Corporation, including Respondent (R. 59-76). The action is now pending for trial. It was brought for treble damages under section 205(e) of the Act and the complaint alleged that sales of whiskey warehouse receipts were made on or about January 4, 1943, by either the corporation, its officers, its directors, a stockholders distribution committee, or the individual stockholder defendants, in violation of MPR 193. The maximum prices alleged to be applicable were March 1942 prices charged by Stitzel-Weller Distillery Company and Patrick F. Hackett & Sons, purported to be the most closely competitive sellers of the same class for the same commodity or the similar commodity most nearly like it (R. 72).

An undivided interest in the warehouse receipts sold had been acquired by Respondent and the other stockholders

pursuant to the corporation's liquidation and dissolution (R. 21, 83-86, 95, 154, 175) which was found by The District Court to be in the proper course of business and to involve no sham or lack of good faith. *Louisville Trust Co.* v. *Glenn*, 65 Fed. Supp., 193, 202 (D. C., W. D., Ky.). The sales were actually made by the stockholders distribution committee (R. 258). The Respondent was not, nor had he at any time been, an officer, director or employee of the corporation, or connected with it other than as a stockholder, nor did he have any controlling interest therein (R. 257-8, 270) nor was he a member of the stockholders distribution committee (R. 32). Respondent was not a seller at wholesale or retail of whiskey or warehouse receipts for whiskey (R. 25). The sales were isolated sales consequent upon the liquidation and dissolution.

At the time of the sales in January 1943 MPR 193 was in force. Section 1420.13 of MPR 193 provided three alternative maximum prices designated by Petitioner as "Rule 1," "Rule 2," and "Rule 3," namely, (1) seller's March 1942 price—admittedly here inapplicable; (2) the March 1942 price charged by the most closely competitive seller,—the price alleged in the treble damage suit to have been violated and (3) a price in line with the level of maximum prices established by the GMPR *to be determined by the seller following application* to the Administrator under subsection (c) of section 1499.3, GMPR, and authorization from him.

On May 26, 1945, about 2-½ years after the sales were made and completed and about two years after the institution of the treble damage action, the Assistant General Counsel, OPA, wrote Respondent that "doubt or uncertainty" existed with respect to which of the pricing provisions of MPR 193 was applicable to the sales (R. 28) and in effect invited Respondent to make application at that late date for the establishment of a maximum price. No application was made (R. 28-29).

Thereupon on June 13, 1945, over two and a half years after the sales and two years after suit was brought the Administrator issued Order 45. Order 45 prescribes a dollars and cents price. It is a price applicable solely to sales made during the month of January 1943 by approximately 50 persons named in the order. These persons are the defendants in the pending treble damage action and the January sales are the subject matter of that suit. Order 45 has only a retroactive effect, no prospective effect.

Order 45 states on its face that it is issued pursuant to section 1499.3(c), GMPR. This GMPR subsection provides that a seller, in case of a sale at wholesale or retail, is authorized to make application in stated form for a maximum price to be determined by him after an authorization from the Office of Price Administration in the form of an order issued following the application and prescribing a method of determining the maximum price.

The Administrator's Opinion accompanying Order 45, after referring to the pending litigation in the District Court, states that the issues whether the persons named in the Order did in fact make any sale, and whether the sales are governed by the prices of the most closely competitive sellers "have been tendered in the litigation and should appropriately be determined by the District Court." The Opinion then proceeds—

> "The accompanying order will be applicable only in the event that the District Court . . . finds that maximum prices for sales by such persons, or any of them, could not be established under section 1420.13(a) or (b) of Maximum Price Regulation 193" (R. 187).

In other words the Administrator states that if the price alleged in his complaint does not apply, then the District Court shall apply the dollars and cents price of Order 45. The Administrator's position appears to be that the District Court under section 204(d) of the Act must apply the Order without giving consideration to its validity.

MPR 193, section 1420.13, prescribed two ceilings applicable to commodities, and provided a method by which a third ceiling could be determined. Since Respondent made no sales in March 1942, and Petitioner apparently doubts that any sales were made by his most closely competitive seller, no ceilings applicable to these sales existed in January 1943. Assuming the regulation was applicable to Respondent with respect to these sales, it became the duty of Respondent, before making a sale, to apply to the Administrator to issue "*an order prescribing a method of determining the maximum price.*" GMPR, section 1499.3(c). Respondent's offense, if any, was not that he made a sale in excess of a prescribed ceiling price, but that he made a sale without having first applied to the Administrator to issue an order prescribing a method of determining an applicable ceiling price. For that offense the Act prescribes a criminal penalty and no treble damage action can be maintained, since there is no ceiling price against which to measure the excess. The Administrator has not chosen to invoke the criminal penalty, nor to rely upon his ability to prove his charge that the sales were in excess of prices at which the most closely competitive seller had made sales, but, rather seeks, after the sales are made, to create and impose his own penalty.

On January 11, 1946, Respondent filed a protest with the Administrator against Order 45 (R. 19). The protest was denied (R. 146). Complaint was filed with the United States Emergency Court of Appeals (R. 254). That court adjudged Order 45 invalid from the date of its issuance (R. 328-9). The court stated that the GMPR, section 1499.3(c), did not authorize a retroactive price order of the character of Order 45 and that Order 45 was not authorized by section 2 of the Act, since the only purpose of Order 45 was to liquidate the damages in a pending suit between the Administrator and certain sellers, including Respondent (R. 318-19, 341). The court also said that if the Act had authorized such an order as Order 45, then the Act might well

be unconstitutional as involving usurpation of judicial power (R. 319, 341).

The court did not give Respondent a choice between filing an application or having the District Court determine a dollars and cents ceiling, as stated in Petitioner's brief (pp. 8, 10). The effect of the decision is that the District Court is to apply whatever price was prescribed by regulations in effect at the time of the sale and that the Administrator may not substitute his own penalty for the Congressional penalty for failure to file application.

ARGUMENT.

1. The Circuit Courts of Appeal Decisions are not in Conflict.

The decision of the United States Emergency Court of Appeals is not "in conflict with the decision of another circuit court of appeals on the same matter." Petitioner's brief (p. 10) states that the decision below is in conflict with the "views" expressed by (not, it should be noted, the decisions of) the Circuit Courts of Appeal for the Third and Ninth Circuits in the cases of *Porter* v. *Senderowitz,* 158 F. 2d, 435 (C.C.A. 3rd, 1946), pending on petition for writ of certiorari *sub nom. Senderowitz* v. *Fleming,* Nos. 677 and 678, and *Martini* v. *Porter,* 157 F. 2d 35 (C.C.A. 9th, 1946), pending on petition for writ of certiorari *sub nom. Martini* v. *Fleming,* No. 813. "Views" do not constitute a decision. By "views" Petitioner is referring to certain dicta as to the validity of the Administrator's orders there involved. Since those cases were appeals in treble damage suits, brought under section 205(e) of the Act, the Circuit Courts of Appeal, as a consequence of the prohibitions in section 204(d) of the Act, had no jurisdiction or power to consider the validity of any regulation, order, or price schedule of the Administrator. Thus in the Senderowitz case the Court stated: "A determination of the validity of a regulation [is] something which neither the District Court nor we are

given authority to pass upon." In the Martini case, the Court pointed out that it could not (i.e., had no jurisdiction or power to) condemn the retroactive character of the order in that case and so had to regard it as a mere and proper adjunct to GMPR section 1499.3(c).

The only case of which counsel are aware, in which a circuit court of appeals has decided a related point (instead of expressing "views" thereon) is *Porter* v. *The Sherwood Distilling Company,* 156 F. 2d, 264 (C.C.A. 4th, 1946) and that case is not in conflict with the decision below. There, as here, the Administrator sought to induce the filing by the seller of a belated application to the Administrator for the establishment of a maximum price for sales made many months earlier. In the Sherwood Distilling Company case the Administrator sought this result by suit for a mandatory injunction compelling the filing of an application. In the present case, Respondent having failed to make application in response to the OPA's letter of May 26, 1945, the Administrator sought to accomplish the equivalent result by issuing an order just as though a timely application had been made.

In the *Sherwood Distilling Company* case the Circuit Court of Appeals denied the injunction and stated that "A present application by the defendant for the establishment of a price for the sale of goods already made will not be a compliance with the regulation which requires an application to be made before the sales take place" (id., p. 269). The Court then went on to point out that the defendant could have been subjected to an injunction or other order under section 205(a) of the Act during the period of its violations and could have been indicted or punished by fine or imprisonment under section 205(b) of the Act for failure to file application (id., p. 269).[1]

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[1] The Administrator had not in the Sherwood Distilling Company case issued any retroactive order but was seeking to compel an application from the seller which would afford the basis for the issuance of such an order. However, the Administrator stated

2. No Important Question of Federal Law is Presented.

Petitioner's brief states that 398 actions, based on 200 orders issued subsequent to filing of complaints in district courts under section 205(e) of the Act and involving over 18 million dollars, are pending. The fact that there are 395 other pending actions similar to Nos. 1080, 1081, and 1082, involving around eleven million dollars in addition to the approximately seven million dollars claimed in Nos. 1080, 1081, and 1082, or that the Administrator may have exceeded his power in issuing the 199 other orders, does not make the question here presented an important question of Federal law which has not been, but should be, settled by this Court. It would not be important if there were one 18 million dollar case instead of 398 cases totaling that amount. It is no more important by reason of the fact that there are several suits, rather than one suit.

Order 45 never had any prospective operation, but was solely retroactive. MPR 193 is no longer in effect and there is no longer price regulation of alcoholic beverages. Effective November 10, 1946, all commodities except sugar, syrups, and rice were exempt from price control (OPA Supplemental Order 193, 11 F. R. 13464). On the previous day the President stated that—

> "The general control over prices and wages is justifiable only so long as it is an effective instrument

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that he did intend to issue a retroactive order later. On rehearing the Circuit Court of Appeals said that in the event the Price Administrator did thereafter issue such an order he could move in the District Court to file a supplemental pleading and if the District Court granted the motion the Court could order the seller to plead thereto but "the supplemental pleading shall be subject to all defenses which the Distilling Company may desire to raise" (id., p. 270-1). The opinion on rehearing in no wise indicates that a retroactive price order, if eventually issued by the Administrator, would be the lawful way to proceed instead (as the Court pointed out in the original opinion) of proceeding by way of the remedies that Congress had provided for failure to file an application.

> against inflation. I am convinced that the time has come when these controls can serve no useful purpose. I am, indeed, convinced that their further continuance would do the nation's economy more harm than good. Accordingly, I have directed the immediate abandonment of all control over . . . prices except that necessary to implement the rationing and allocation programs of sugar and rice. Rent control, however, must and will be continued.
>
> . . . . .
>
> "There is no virtue in control for control's sake. When it becomes apparent that controls are not furthering the purposes of the stabilization laws but would, on the contrary, tend to defeat these purposes, it becomes the duty of the Government to drop the controls."—Extract from White House Press Release entitled "Statement of the President," dated November 9, 1946.

It is obvious that the settling of the question presented by this case is of no importance to the future enforcement of the Act, which itself terminates June 30, 1947, nor to the prevention of inflation which is the general purpose of the Act. Winding up OPA litigation is not a matter of national importance, nor are the questions presented in connection therewith questions of such importance as to require settlement by decision of this Court.

3. The Lower Court Decision is not in Conflict with Applicable Decisions of this Court.

This Court has not held that the Act authorizes issuance of retroactive orders of such character as Order 45. An executive officer is bound by his own regulations that have the force and effect of law and retroactive changes in them are not valid unless ratified by Congress. *Arizona Grocery Co.* v. *Atchison T. and S. F. R. Co.*, 284 U. S. 370 (1932), and *Helvering* v. *Reynolds Tobacco Co.*, 306 U. S. 110 (1939).

This Court has repeatedly stated that Acts of Congress are not to be construed to operate retroactively, nor to authorize issuance of retroactive regulations or orders,

unless such legislative intent unequivocally appears. *Miller* v. *United States*, 294 U. S. 435, 439 (1935); *Claridge Apartments Co.* v. *Commissioner of Internal Revenue*, 323 U. S. 141, 164 (1944). This Court has also repeatedly decided that it is the duty of the courts to construe a statute, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but so as to avoid grave doubts on that score. *Screws* v. *United States*, 325 U. S. 91, 98 (1945); *Ex parte Endo*, 323 U. S. 283, 299-300 (1944); *Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co.*, 288 U. S. 14, 40 (1933); *United States* v. *La Franca*, 282 U. S. 568, 574 (1931); *United States* v. *Shreveport Grain and Elevator Co.*, 287 U. S. 77, 82 (1932); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30 (1937).

If the Act were construed to authorize Order 45, then under decisions of this Court, the Act would be so arbitrary as to be lacking in due process contrary to the Fifth Amendment to the Constitution. *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District*, 258 U. S. 338 (1922); *Untermeyer* v. *Anderson*, 276 U. S. 440 (1928); *Nichols v. Coolidge*, 274 U. S. 531 (1927). Also since the treble damages imposed by section 205(e) of the Act clearly fall within the classification of a penalty (*Bowles* v. *Farmers National Bank of Lebanon, Ky.*, 147 F. 2d, 425, 428 (C.C.A. 6th, 1945), the Act, if construed to authorize Order 45, would constitute an ex post facto law contrary to Article I, section 9, clause 3, of the Constitution. *Cummings* v. *Missouri*, 4 Wall. 277 (1867), dealing with an ex post facto law as well as bill of attainder. Finally, if the Act were held to authorize Order 45, the Act would be authorizing an interference with or usurpation of judicial power by the Administrator through prescribing a rule for decision of a pending cause in a particular way.[1] *United*

[1] Contrary to the statement in Petitioner's brief (p. 9), this objection was raised by Respondent in his protest (R. 20), argued at length before the Administrator's Board of Review (R. 338),

States v. *Klein*, 13 Wall. 128 (1872). Such an interference or usurpation would be contrary to Article III of the Constitution which places the judicial power exclusively in the courts and no part of it in the Administrator.

CONCLUSION.

It is respectfully submitted that the petition for certiorari should be denied.

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March 1947.

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renewed in Respondents' complaint (R. 257), argued at length in Respondent's brief before the lower court, and referred to in oral argument before that court by Respondent's counsel and recognized by that court and by counsel for the Administrator as having been raised (R. 332-3, 336-7, 338-9).

APPENDIX.

A. Pertinent Provisions of the Emergency Price Control Act.

(50 U. S. C., App., Supp. V, § 901 et seq.)

Sec. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941: *Provided*, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. . . .

* * * * * * * * * *

(c) Any regulation or order under this section may be established in such form and manner, may contain such

classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. . . .

Sec. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202(b) or section 205(f), or to offer, solicit, attempt, or agree to do any of the foregoing.

Sec. 204. . . . (d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Sec. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provisions of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(b) any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4(c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

* * * * * * * * * *

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precau-

tions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered. . . .

B. Pertinent Provisions of Maximum Price Regulation No. 193, as in Effect During January 1943 (7 F. R. 6006).

Sec. 1420.13 Maximum prices for domestic distilled spirits—

* * * * * * * * * *

(b) *Determination of maximum prices by reference to maximum prices of most closely competitive seller.*—If the seller's maximum price for the domestic distilled spirits to be priced cannot be determined under paragraph (a) of this section, the seller's maximum price for such domestic distilled spirits shall be the maximum price established under paragraph (a) of this section for the most closely competitive seller of the same class for such domestic distilled spirits or for the similar commodity most nearly like it (as such term is defined in § 1499.2 of the General Maximum Price Regulation) for sales to a purchaser of the same class.

(c) *Determination of maximum prices under § 1499.3 of the General Maximum Price Regulation.*—If the seller's maximum price for the domestic distilled spirits to be priced cannot be determined under paragraph (a) or paragraph (b) of this section, the seller's maximum price for such domestic distilled spirits shall be determined in accordance with § 1499.3 of the General Maximum Price Regulation.

C. Pertinent Provisions of the General Maximum Price Regulation as in Effect During January 1943 (7. F. R. 3153, 7093).

Sec. 1499.3. *Maximum prices for commodities and services which cannot be priced under § 1499.2.*—The seller's maximum price for a commodity or service which cannot be priced under § 1499.2 of this General Maximum Price Regulation shall be a maximum price in line with the level of maximum prices established by this General Maximum Price Regulation. Such price shall be determined by the seller in accordance with the following procedures:

* * * * * * * * * *

(c) In the case of a sale at wholesale or retail of a commodity which cannot be priced under paragraph (a) of this section, the maximum price shall be a price determined by the seller after specific authorization from the Office of Price Administration or any duly authorized officer thereof. A seller who seeks an authorization to determine a maximum price under the provisions of this paragraph shall file with the regional office of the Office of Price Administration for the region in which his principal place of business is located an application setting forth (1) a description of the commodity or commodities for which a maximum price is sought; (2) a statement of the reasons why such commodity or comodities cannot be priced under § 1499.2 or § 1499.3(a) of this General Maximum Price Regulation; and (3) any other facts which the seller wishes to submit in support of the application. The seller shall also submit such additional pertinent information as the regional office may require. Such authorization will be given in the form of an order prescribing a method of determining the maximum price.

D. Order No. 45, Issued June 13, 1945 (10 F. R. 7206).

OFFICE OF PRICE ADMINISTRATION.

[GMPR, Section 1499.3(c), Order No. 45]

Authorization of Maximum Prices A. J. Cummins et al.

For the reasons set forth in the opinion issued simultaneously herewith and filed with the Division of the Federal Register, and pursuant to Section 1499.3(c) of the General Maximum Price Regulation, *It is ordered:*

(a) (1) The maximum price for sales of bulk domestic whiskey, evidenced by warehouse receipt or otherwise, by the persons named in paragraph (b) hereof, for sales made during the month of January, 1943 (in the event that any such persons made such sales), shall be the maximum price established by that person in accordance with section 1420.13(a) or (b) of Maximum Price Regulation 193.

(2) In the event that any person named in paragraph (b) hereof is unable to establish a maximum price for his sales of bulk domestic whiskey in accordance with sub-paragraph (1) above, the maximum price for such sales during the month of January, 1943 shall be the appropriate amount set forth in section 1420.13 (g) of Maximum Price Regulation 193 in accordance with the age of the whiskey being priced.

(3) Section 1420.10(a)(5), (6) and (7) and section 1420.13(e), (f), (g), (h) and (i) of Maximum Price Regulation 193, as in effect on February 3, 1943, are incorporated herein by reference.

(b) This order shall apply to all sales of bulk domestic whiskey made during the month of January, 1943, by the following persons, in the event that any such persons made such sales:

A. J. Cummins, W. M. Morrison, Louis J. Newman, Earl J. Mock, individually and as officers of the Cummins Distilleries Corporation.

A. J. Cummins, W. M. Morrison, Louis J. Newman, Roy St. Lewis, Hiram Neuwoehner, John W. Smart, individually and as directors of Cummins Distilleries Corporation.

W. M. Morrison, Max Waldman, William Wagner, individually and as the Cummins Stockholders' Distribution Committee.

Morrel D. Klein, and Robert R. Appel, individually and d/b/a Klein and Appel.

John W. Smart, and William Wagner, individually and d/b/a Smart and Wagner.

Allan L. Carter, Jr., C. Prevost Boyce, Henry C. Evans, William T. Childs, C. Newton Kidd, Milton S. Trost, Robert S. Lansburg, William K. Barclay, Jr., Leroy A. Wilbur, Edward J. Armstrong, individually and d/b/a Stein Bros. and Boyce.

Farmers National Bank of Lebanon, Kentucky, Executor of the estate of George W. Dant.

G. C. Collins, Jr., Christine Hunt Collins, Louis J. Newman, Lillian Newman, W. M. Morrison, Marcella W. Morrison, David J. Williams, T. E. Spragens, J. D. Clark, D. P. Newell, Mrs. Jessie S. Miner, James Burt Miner, Mrs. Anna Bell Bickett, Adolph F. Rupp, Phil E. Lahman, Mrs. Gladys G. Minton, Clara McCoy, John McCoy, Stanley McCoy, Mary Lee Hiner, Hiram Neuwoehner, Edwin C. Willis, R. J. Haury, A. J. Cummins, Yancey Lee Cummins, Roy St. Lewis, Edward J. Miller, Adolph Hirsch, Russell Ebinger, Adolph H. Gossmahn, Mrs. Marcellus G. Mature.

(c) This order may be revoked or amended by the Price Administrator at any time.

(d) This order shall become effective immediately.

(e) Issued this 13th day of June, 1945.

[S] Chester Bowles
CHESTER BOWLES,
Administrator.

E. Opinion Accompanying Order No. 45—Under Section 1499.3 (c) of the General Maximum Price Regulation (R. 186).

There is now pending and undetermined in the United States District Court for the Western District of Kentucky an action entitled *Chester Bowles, Price Administrator, Office of Price Administration, Plaintiff, against Cummins Distilleries Corporation,* the persons named in paragraph (b) of the accompanying order and others, defendants. The Price Administrator claims in said action that Cummins

Distilleries Corporation or in the alternative, the persons named in the accompanying order or some of them, sold bulk whiskey, evidenced by warehouse receipts or otherwise, at prices in excess of the maximum prices for sales of such commodities established by applicable regulations of the Office of Price Administration. The Price Administrator also claims in the said action that some or all of the persons named in the accompanying order were required to establish their maximum prices for sales of bulk domestic whiskey by reference to their most closely competitive sellers. Some of the defendants, however, deny that there was any most closely competitive seller on the basis of whose sales maximum prices could be established. If that should be found to be the case, then the sellers would have been required to establish their maximum prices by application under Section 1420.13(c) of Maximum Price Regulation 193. However, none of the persons named in said order has applied for the establishment of a maximum price under that section.

The accompanying order is not based on any finding that the persons named therein did, in fact, make any sale, or that the sales involved in the litigation are not governed by the prices of the most closely competitive sellers. These issues have been tendered in the litigation and should appropriately be determined by the District Court.

The accompanying order will be applicable only in the event that the District Court finds that the persons named in that order, or any of them, were the sellers of the bulk whiskey involved in the litigation, and in the event that the District Court also finds that maximum prices for sales by such persons, or any of them, could not be established under Section 1420.13(a) or (b) of Maximum Price Regulation 193.

The maximum prices established by the accompanying order generally reflect the highest prices prevailing in March 1942 for bulk domestic whiskey and make appropriate allowance for storage and carrying charges. In the opinion of the Price Administrator, those prices are generally fair and equitable in their application to all types of domestic whiskey.

Issued this 13th day of June, 1945.

[S] Chester Bowles
CHESTER BOWLES,
Administrator.